NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

ELIAS FEUER,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

2019-1390

Petition for review of the Merit Systems Protection Board in No. NY-1221-17-0200-W-1.

Decided: September 13, 2019

ELIAS FEUER, New York, NY, pro se.

SONIA W. MURPHY, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by JOSEPH H. HUNT, ALLISON KIDD-MILLER, ROBERT EDWARD KIRSCHMAN, JR.

Before PROST, *Chief Judge,* PLAGER and DYK, *Circuit Judges.*

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PER CURIAM.

Elias Feuer appeals from the Merit Systems Protection Board ("Board") holding that the National Labor Relations Board ("NLRB") did not violate Feuer's rights under the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8), because (1) it did not take any personnel action against him and (2) the NLRB had shown by clear and convincing evidence that it would have taken the same action regardless of Feuer's protected disclosures. We reject the Board's first ground but *affirm* as to the second ground.

BACKGROUND

Feuer was employed as a lawyer at the NLRB for thirty-two years. In 2012, he was appointed to an Administrative Law Judge ("ALJ") position at the Social Security Administration ("SSA"). In July 2016, the NLRB posted an announcement for "more than one" ALJ vacancy located in the Washington, D.C. and New York, New York duty stations. The posting stated that "[c]andidates must currently hold an Administrative Law Judge position, at the AL-3 level or above for at least one year or be eligible for reinstatement to an ALJ position based on prior experience as an ALJ." J.A. 449. Feuer, who was qualified for the vacant positions, applied seeking an appointment to the New York position. He was not selected. Two other candidates were selected for the New York duty station and three candidates were selected for the Washington, D.C. duty station.

After learning of his non-selection, Feuer contacted the NLRB on five separate occasions with allegations of agency misconduct. Feuer claimed, *inter alia*, that one of the ALJs who had been selected for the New York position, Benjamin Green, did not meet the one-year requirement under the NLRB's posting. At the close of the posting, Green had less than one year of service as an ALJ at the SSA. After an internal investigation, the NLRB determined, in consultation with the Office of Personnel Management ("OPM"), that the one-year requirement was solely intended to

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implement an OPM regulation that prohibited transfer of an ALJ to a new position within one year of the ALJ's last appointment without consent of the transferee and transferor agencies. The NLRB determined that on the date of his scheduled transfer from the SSA to the NLRB, Green would have served at his ALJ position for over one year and was therefore eligible under the regulation and the vacancy announcement. On November 13, 2016, the NLRB appointed Green to the New York position as it had originally planned to do before Feuer made his disclosures. On November 14, 2016, the agency mistakenly reposted the vacancy announcement before taking it down within one day.

Feuer appealed the agency's actions to the Board, alleging that the NLRB's decision not to select him for the allegedly vacant New York position after his protected disclosures and its subsequent decision not to select him in connection with the November 14 posting were made in retaliation for his whistleblowing activities. After a four-day hearing, the ALJ denied Feuer's appeal. The ALJ concluded that Feuer had made two protected disclosures: (1) an October 17, 2016 telephone call to Mark Pearce, Chairman of the NLRB, alleging that the NLRB engaged in age discrimination, nepotism, and violations of its standard hiring procedures and (2) an October 24 letter sent to Chairman Pearce wherein Feuer made the same allegations as his telephone call, as well as the allegation that Green's appointment was improper. The ALJ found that Feuer's disclosures satisfied the knowledge/timing test and were "contributing factors" under 5 U.S.C. § 1221(e)(1). However, the ALJ found that the retaliation that Feuer alleges—the agency's non-selection of Feuer for the New York position as well as its November 14 posting—were not "personnel actions" as defined by 5 U.S.C. § 2302(a)(2)(A). The ALJ also found that even if these events constituted personnel actions, the agency had proven by clear and convincing evidence that Feuer would not have been selected for the position.

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Feuer did not seek review from the full Board, but instead timely filed a petition for review in our court. The ALJ's decision became the decision of the Board. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

DISCUSSION

Our review of Board decisions is limited to whether the decision was "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). Our review is "without regard to errors" that do not affect the parties' "substantial rights." 28 U.S.C. § 2111; *see also Boss v. Dep't of Homeland Sec.*, 908 F.3d 1278, 1282 (Fed. Cir. 2018).

Agencies may not take or fail to take personnel action against an employee in retaliation for a protected whistleblower disclosure. *See* 5 U.S.C. § 2302(b)(8). A protected disclosure is "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences . . . a violation of any law, rule, or regulation." *Kahn v. Dep't of Justice*, 618 F.3d 1306, 1311 (Fed. Cir. 2010) (alteration in original) (quoting 5 U.S.C. § 2302(b)(8)(A)). Personnel action includes non-selection for an appointment. *See Ellison v. Merit Sys. Prot. Bd.*, 7 F.3d 1031, 1034 (Fed. Cir. 1993); *Monasteri v. Merit Sys. Prot. Bd.*, 232 F.3d 1376, 1380 (Fed. Cir. 2000); *Ruggieri v. Merit Sys. Prot. Bd.*, 454 F.3d 1323, 1325 (Fed. Cir. 2006).

I

Feuer first argues that the Board erroneously found that he had made only two protected disclosures when he had in fact made five protected disclosures. The Board determined that Feuer made two protected disclosures: a telephone call to Chairman Pearce on October 17, 2016 and a letter sent to Chairman Pearce on October 24, 2016. Feuer alleges that the Board failed to consider his three

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subsequent disclosures: a formal complaint filed with the NLRB Inspector General on October 28, 2016, a letter sent to the NLRB attorney Jennifer Kovachich on November 7, 2016, and an email sent to the Inspector General on November 8, 2016. The Board's analysis of Feuer's protected disclosures failed to mention these subsequent disclosures. Feuer's additional disclosures were substantively the same as his initial disclosures to Chairman Pearce with one exception. Feuer's November 7th letter and November 8th email included a new allegation that the agency intended to create a sham posting to hire the ineligible candidate. The Board erred when it failed to consider these three additional protected disclosures. However, consideration of these additional disclosures—which were largely the same as his earlier disclosures—would not have affected the result. Therefore, the Board's error was harmless. 28 U.S.C. § 2111.

II

The Board held that Feuer had made protected disclosures and that because Feuer made his disclosures directly to the Chairman within one month of his alleged personnel actions, there was a presumption that Feuer's disclosures were "contributing factors" as defined under 5 U.S.C. § 1221(e)(1). But it held that there had been no personnel action (i.e. non-selection) because following his disclosure there had been no vacancy. The question of whether a vacancy existed because Green was not qualified depends on the interpretation of the vacancy announcement's requirement that "[c]andidates must currently hold an Administrative Law Judge position . . . for at least one year." J.A. 449.

The Board held that the posting "as a whole" was "somewhat ambiguous" and that the phrase "must currently" was subject to reasonable debate, and therefore deferred to the NLRB's interpretation that the one-year requirement was satisfied as long as Green had one year

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